Written by **Patrick Krey** on May 4, 2009

The FCC and “Fleeting Expletives”

The FCC modified their rule and extended the ban to include even a single usage of a vulgar word. This is what they referred to as “fleeting expletives.” Fox TV and other broadcasters filed suit in federal court on grounds that the FCC was violating their First Amendment rights. The Second Circuit ruled for the broadcasters, but not on constitutional grounds. The court held that the FCC’s reasoning was “arbitrary and capricious” under the Administrative Procedure Act (APA). The APA is the federal law which governs the way in which administrative agencies may propose and establish regulations. The APA has been referred to as a “bill of rights” for those whom find themselves tangled up in the massive web of federal regulatory agencies.

The Supreme Court reversed the decision of the inferior court holding that the ban is acceptable under the APA. The court did not address the First Amendment issue. The opinion of the court, written by Justice Antonin Scalia, dealt primarily with the APA and the standard for reviewing federal regulation in regards to indecency.

The constitutional question seemingly never raised in matters like this should be — “Is the FCC constitutional?” The FCC was established in 1934 as part of Franklin Roosevelt’s New Deal which spawned numerous other agencies. Administrative agencies have become such a large and powerful part of the federal government that they have been collectively referred to as the fourth branch or “the administrative state.” Political Science Professor Ronald J. Pestritto argues that the concept of the administrative state conflicts with the principles embodied in our Constitution.

> For those who hold the Constitution of the United States in high regard and who are concerned about the fate of its principles in our contemporary practice of government, the modern state ought to receive significant attention. The reason for this is that the ideas that gave rise to what is today called ‘the administrative state’ are fundamentally at odds with those that gave rise to our Constitution. In fact, the original Progressive-Era architects of the administrative state understood this quite clearly, as they made advocacy of this new approach to government an important part of their direct, open, comprehensive attack on the American Constitution.

The creation of these federal agencies brings many constitutional issues into question. What about the separation of powers between the legislative and the executive branches? (Federal agencies fall under the executive branch.) Can Congress delegate its legislative power to these rule-making agencies? What about the federal government only being able to exercise specifically enumerated powers? (The Tenth

Amendment states: “All powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people.”)

The administrative state not only violates principles written into the Constitution by our Founders, it also conflicts with both the drafters’ and ratifiers’ vision for operation of the federal government. Alexander Hamilton, writing as Publius in *The Federalist*, No. 84, responded to anti-federalist claims that the new central government would create an expanding and costly supply of new offices.

> *It is evident that the principal departments of the administration under the present government*[then existing under the Articles of Confederation],*are the same which will be required under the new.* There are now a Secretary of War, a Secretary of Foreign Affairs, a Secretary for Domestic Affairs, a Board of Treasury, consisting of three persons, a Treasurer, assistants, clerks, etc. These officers are indispensable under any system, and will suffice under the new as well as the old. [Emphasis added.]

While some genuine social conservatives may be pleased that obscene language is being curtailed on television, Americans should not forget that the federal government is encroaching into yet another area where they do not have any constitutional authorization. Regulation for television broadcasts could constitutionally be handled at the state level or more appropriately and effectively handled by the ultimate regulator: the free market, particularly when that market is informed by Judeo-Christian values. Viewing the FCC’s actions through the prism of the APA without addressing its lack of constitutional authorization misses the point. It would appear that the debate regarding the FCC’s new rule gives “fleeting” consideration to our Founding Document.

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